

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ROBERT G. ROGERS

Claimant

V.

ALT-A&M JV LLC¹

Respondent

Docket No. 1,053,980

ORDER

Respondent, through Patrick C. Smith, of Pittsburg, requested review of Administrative Law Judge Brad E. Avery's May 14, 2015 Order for penalties and attorney fees. William L. Phalen, of Pittsburg, appeared for claimant. Oral argument was held August 4, 2015, in Pittsburg. Due to a conflict, Board Member Thomas D. Arnhold recused himself from this appeal and Wade A. Dorothy was appointed as Board Member Pro Tem in this case.

The appeal record is the same as what the judge considered, consisting of the April 24, 2015 motion hearing transcript and exhibit, and the pleadings in the administrative file.

ISSUES

At oral argument, respondent abandoned its argument against penalties in light of the *Nuessen* ruling.² The remaining issue is whether claimant is entitled to attorney fees.

FINDINGS OF FACT

In a May 6, 2014 Award, the judge determined claimant's September 15, 2008 accidental injury was compensable and awarded \$12,776.19 in disability benefits. Respondent appealed to the Board, which affirmed the judge's ruling on December 4, 2014. On January 2, 2015, respondent appealed the Board's ruling to the Kansas Court of Appeals.

On April 16, 2015, claimant filed a Motion for Attorneys Fees for time spent defending respondent's request for review to the Board, reviewing the Board's ruling and discussing the same ruling with his client. Respondent argued no statutory authority allows payment of attorney fees for services related to Board review of a judge's decision, and an award of attorney fees is prohibited by K.S.A. 44-536(a) prior to the ultimate disposition of the initial and original claim.

¹ Respondent was uninsured at the time of claimant's accident. See *Rogers v. ALT-A&M JV, LLC*, No. 1,053,980, 2014 WL 7521733, at *1 (Kan. WCAB Apr. 12, 2014).

² *Nuessen v. Sutherlands*, No. 111,417, 2015 WL 3636269 (Kansas Court of Appeals published opinion filed June 12, 2015).

A hearing on claimant's requests for attorney fees was held on April 24, 2015. The judge ruled, in part:

In *Regina Hernandez v. State of Kansas* DN 107,745 (2012) unpublished opinion (reviewed denied), the Kansas Court of Appeals stated:

Attorney fees may be awarded by an ALJ in the following instances:

First, a decision of an ALJ is reviewable by the Board, upon application, and an attorney is entitled to fees for this service. See *K.S.A. 2011 Supp. 44-551(i)(1)* (emphasis added). Second *K.S.A. 44-526 [sic]* permits an employee and an employer to modify an award, which may be reviewable by an ALJ. *K.S.A. 44-528(a)*. And an attorney is entitled to fees for this service. See *K.S.A. 44-536(g)*. Third *K.S.A. 44-510k(a)(1)* permits an employee to apply for a hearing for post award medical treatment, and the ALJ may award fees for his or her work. *K.S.A. 44-510k(c)*. Fourth, an employee can request, from the ALJ, penalties when an employer does not pay. *K.S.A. 44-512a*. And an attorney is entitled to fees for his or her work in obtaining these penalties. See *K.S.A. 44-536(g)*. Hence we find that like the enumerated list before it, the fifth circumstance described by the term "or otherwise" *deals only with work an attorney performs in connection with proceedings before the agency*. (Emphasis added)

...

The Court of Appeals, in citing 44-551, implicitly found an ALJ award represented the "ultimate disposition of the initial and original claim." In addition, *K.S.A. 44-536(g)* allows for attorney fees to be paid for representation in miscellaneous actions characterized "or otherwise." The phrase is not defined in the Workers Compensation Act. The Appeals Board has stated, "..... According to Webster's II New College Dictionary, the term "otherwise" has several meanings including "different from that or those specified or implied." Use of that term widely broadens rather than restricts the scope and application of *K.S.A. 44-536(g)*." See *Larry J. Simmons DN 186,887*.

Mr. Phalen, claimant's attorney, has submitted a demand for fees in the amount of \$4,420.00 for his representation of the claimant before the Board, and though the self-insured respondent disputes entitlement to any fees, no issue was raised regarding the amount of the fees. Based upon the language of *Hernandez*, op. cit. and the holding of the Court that *K.S.A. 44-536(g)* applies to only services of an attorney provided before the Division of Workers Compensation and the Board's broad construction of the requirements of *K.S.A. 44-536(g)*, the Court orders the self-insured respondent [to] pay Mr. Phalen \$4,420.00 in attorney fees.³

³ ALJ Order (May 14, 2015) at 3-4.

On appeal, respondent maintains there is no statutory authority for attorney fees for services related to the Board's review of the judge's decision and K.S.A. 44-536(a) prohibits an award of attorney fees prior to the ultimate disposition of the initial and original claim. Claimant maintains the Order should be affirmed based on *Hernandez*.

PRINCIPLES OF LAW

K.S.A. 44-536 states, in part:

(a) With respect to any and all proceedings in connection with any initial or original claim for compensation, no claim of any attorney for services rendered in connection with the securing of compensation for an employee . . . shall exceed a reasonable amount for such services or 25% of the amount of compensation recovered and paid, whichever is less, in addition to actual expenses incurred, and subject to the other provisions of this section. . . .

(b) All attorney fees in connection with the initial or original claim for compensation shall be fixed pursuant to a written contract between the attorney and the employee or the employee's dependents

. . .

(g) In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis.

"The right to attorney's fees . . . is wholly dependent on the provisions of the compensation acts, and fees are allowable only in such proceedings and in such circumstances as the statutes permit."⁴ "Statutory attorney fee awards serve to deter potential violators and encourage voluntary compliance with the statute involved."⁵

A plain and unambiguous workers compensation statute should be interpreted based on its express language without speculation on legislative intent or judicial modification.⁶

⁴ *Hernandez v. State*, No. 107,745, 2012 WL 4937630 (Kansas Court of Appeals unpublished opinion filed Oct. 12, 2012), *rev. denied* 297 Kan. ____ (2013).

⁵ *May v. University of Kansas*, 25 Kan. App. 2d 66, 70, 957 P.2d 1117 (1998).

⁶ See *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

K.S.A. 2008 Supp. 44-551(i)(1) states:

Administrative law judges shall have power to administer oaths, certify official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, documents and records to the same extent as is conferred on the district courts of this state, and may conduct an investigation, inquiry or hearing on all matters before the administrative law judges. All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a, and amendments thereto, made by an administrative law judge shall be subject to review by the workers compensation appeals board upon written request of any interested party within 10 days. Intermediate Saturdays, Sundays and legal holidays shall be excluded in the time computation. Review by the board shall be a prerequisite to judicial review as provided for in K.S.A. 44-556, and amendments thereto. On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.

ANALYSIS

Claimant's attorney is not entitled to attorney fees for countering respondent's appeal to the Board or discussing the Board's ruling with his client.

K.S.A. 44-536(g) allows attorney fees for services rendered to a claimant subsequent to the "ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise" This matter does not involve review and modification or a request for additional medical treatment and claimant did not request attorney fees in connection with his K.S.A. 44-512a motion. Claimant sought attorney fees for work performed following the judge's Award in answering respondent's appeal to the Board. Therefore, attorney fees would only be appropriate for services rendered "otherwise" after the "ultimate disposition of the initial and original claim."

For the purposes of this case, we need not address any and all situations when the "ultimate disposition of the initial and original claim" occurs for the purposes of obtaining attorney fees under K.S.A. 44-536(g). Arguably, a case is not ultimately disposed of when it is on review to the Board or to the appellate courts.⁷ We conclude, at a minimum, the ultimate disposition of an initial and original claim is not decided by an administrative law judge in cases where the ruling is pending on appeal before the Board. The judge's Award was not the "ultimate disposition of the initial and original claim."

⁷ See *Ferrell v. Day & Zimmerman, Inc.*, 223 Kan. 421, 423, 573 P.2d 1065 (1978) ("[W]here an award is appealed and the decision of the reviewing court modifies the original award . . . both parties are on notice that the award is not 'final' until the reviewing court has acted.").

The appealed ruling was largely based on *Hernandez*, where an injured worker, Ms. Hernandez, appealed a Board ruling to the Kansas Court of Appeals. After the Court of Appeals ruled, her attorney asked the administrative law judge to award attorney fees for work he performed before the Court of Appeals. The judge declined and the Board affirmed such ruling. The singular issue on appeal in *Hernandez* was whether the Board could award attorney fees for work the attorney performed before the Court of Appeals. *Hernandez* held the Board had no express or clear statutory authority to award attorney fees and the injured worker's proper remedy was to have asked the Court of Appeals to determine attorney fees under Supreme Court Rule 7.07, but no request was made.

Apart from such narrow holding, *Hernandez* cites K.S.A. 2011 Supp. 44-551(i)(1) and states, "a decision of an ALJ is reviewable by the Board, upon application, and an attorney is entitled to fees for this service" Based on such language, the judge stated *Hernandez* "implicitly" held an administrative law judge's award is the "ultimate disposition of the initial and original claim." Unlike the judge, we perceive the aforementioned commentary from *Hernandez* to be outside the case's holding and potentially dicta. *Hernandez* neither implicitly or explicitly holds a judge's ruling following a regular hearing is the "ultimate disposition of the initial and original claim." In fact, *Hernandez* contains no discussion which identifies the "ultimate disposition of the initial and original claim."⁸

Additionally, the plain language of K.S.A. 44-551(i)(1) does not support the conclusion reached by the judge. K.S.A. 44-551(i)(1) concerns the powers of an administrative law judge and notes awards (final, preliminary or modifications), may be appealed to the Board. While K.S.A. 44-551(i)(1) uses the term "final orders," it does not state such term is the same as the "ultimate disposition of the initial and original claim." The finality of an award appealed to the Board is in doubt, and not the "ultimate disposition of the initial and original claim" because the Board may grant or refuse compensation, increase or diminish an award or remand the case for further proceedings.

Also, a party is generally not entitled to attorney fees on appeal without express statutory authority. K.S.A. 44-551(i)(1) says nothing about awarding attorney fees for work performed between the time a judge decides a case and the Board's ruling.

The judge emphasized the part of *Hernandez* which noted the "or otherwise" language in K.S.A. 44-536(g) allows attorney fees for work done before the Kansas Division of Workers Compensation. The holding of *Hernandez* only drew a distinction between the authority of the Board to decide attorney fee issues raised to the Board and the powers of the appeals courts to decide attorney fee questions before those tribunals.

⁸ Unlike the instant case, the judge's award in *Hernandez* was the final order of the Division of Workers Compensation. The judge's award in *Hernandez* was not appealed to the Board. Only subsequent proceedings based on a post-award attempt to obtain penalties were before the Board. See *Hernandez v. State*, No. 1,039,320, 2010 WL 4009112 (Kan. WCAB Sep. 10, 2010) and *Hernandez v. State*, No. 1,039,320, 2012 WL 758294 (Kan. WCAB Feb. 21, 2012).

Finally, practicing attorneys have not been requesting attorney fees under K.S.A. 44-536(g) for work performed in responding to an appeal of a judge's award to the Board. If the statute was meant to apply as viewed by claimant and the judge, attorneys for injured workers have left money on the table for many decades. The conclusion reached by the judge – that a claimant's attorney may seek attorney fees for answering a respondent's appeal to the Board of the judge's underlying ruling – has never before been reached by the Board, and to the best of our research, has never been reached by an appellate court.

CONCLUSION

The award of attorney fees is reversed.

AWARD

WHEREFORE, the Board reverses the May 14, 2015 Order to the extent it awarded attorney fees.

IT IS SO ORDERED.

Dated this _____ day of August, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable Brad E. Avery